(21)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 951

SCORUP-SOMERVILLE CATTLE COMPANY,
A CORPORATION,
Petitioner,

vs.

J. LEE MERRION AND RUSSELL WILKINS, COPARTNERS
DOING BUSINESS AS MERRION AND WILKINS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JESSE R. S. BUDGE,
CLARENCE T. WARD,
MITCHELL MELICH,
WALDEMAR Q. VAN COTT,
Counsel for Petitioner.

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vs.

J. LEE MERRION AND RUSSELL WILKINS, COPARTNERS DOING BUSINESS AS MERRION AND WILKINS,
Respondents,

WILLIAM K. SOMERVILLE, ANNIE SOMERVILLE AND ANNIE SOMERVILLE, AS GUARDIAN OF THE PERSON AND ESTATE OF RICHARD D. SOMERVILLE, A MINOR,
Intervenors.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The petition of Scorup-Somerville Cattle Company respectfully shows:

Summary Statement of Matter Involved.

Your petition is a Utah corporation with headquarters at Moab, Utah, and at all times herein mentioned was a solvent, prosperous and going concern (R. 27). Respondents are live-stock commission merchants, of Denver, Colorado.

Prior to July 12, 1941, J. A. Scorup, president of the Scorup-Somerville Cattle Company, had some negotiations with Kemper & Wolf, of Denver, Colorado, for the sale to them of the assets of said company. On said date certain of the stockholders, some of whom were also members of the board of directors, met at Moab, Utah, and a resolution was passed authorizing the president "to sell the holdings" for $532,500.00 (R. 32-33).

Prior to July 12, 1941, the secretary mailed to each stockholder the notice of stockholder's meeting, shown at page 62 of the record, and this was the only notice given and said notice was not published in any newspaper. One substantial stockholder, who was also director, had no knowledge whatever of said meeting until August 7, 1941 (R. 19). There was no notice whatever of any directors' meeting to be held on that date and two directors were not present at said meeting and did not consent to the holding thereof (R. 19, 23).

On August 1, 1941, respondent, Russell Wilkins, called upon J. A. Scorup, at Salina, Utah, and discussed with him the matter of purchasing the company's assets and on the following day the "Optional Contract" (R. 84, 85), prepared by Wilkins (R. 81), was signed, and Wilkins paid Scorup $1000.00.

On August 24, 1941, at Moab, Utah, Wilkins informed Scorup that respondents had decided to exercise the *Alternate Option* contained in said "Optional Contract". The parties could not agree as to the number of cattle to be delivered at the railroad during 1941 (there being no provision in the "Optional Contract" as to when any cattle were to be delivered), and thereupon Wilkins requested Scorup to sign a new contract which had been prepared in Denver by respondents' attorney, one Newton (R. 117), and on August 26, 1941, Wilkins requested Scorup to sign a second contract (R. 119, 120) which had been prepared at

Moab, and which appears at pages 120-126 of the record. Neither of these proposed contracts was signed.

On August 27, 1941, Wilkins delivered to Scorup a letter (R. 90, 91) purporting to accept the first option contained in the "Optional Contract", but no payment or tender of money was made with said letter, notwithstanding the provision of the "Optional Contract" that "When buyer accepts option he agrees to make first payment of $74,000" (R. 85).

On August 31, 1941, which was Sunday, respondents offered to Scorup a draft for $531,500 drawn on themselves, payable only upon the happening of numerous contingencies, and which contains the statement on its face: "This draft is to be used in payment of Sheep or Wool only and will not be honored when drawn for cash or expenses by employee" (R. 116, 117). The tender of the draft was refused.

The parties agreed to meet again on September 2nd at nine o'clock in the morning and on said date Wilkins with his attorneys arrived at Moab about six o'clock in the evening. They met Scorup and his attorneys, and others, at the home of Attorney Melich. Before the beginning of any discussion Clarence T. Ward, one of the attorneys for petitioner, announced: "The deal is off; you have no valid contract and we are not staying any longer; we won't discuss it" (R. 129). Ward then tendered to Wilkins $1000 in currency, which Wilkins declined to acceupt (R. 101). There is a dispute as to whether at this time respondents read a certain letter (R. 128), and offered $74,000, which they claimed to have brought with them in an armored car; but in any event the offer was not made until after the foregoing announcement by attorney Ward (R. 129).

On November 27, 1941, respondents commenced an action for damages in the sum of $277,815.00, in the United States

District Court for the District of Utah. After petitioner answered, respondents took the depositions of the officers of the cattle company, and petitioner took the deposition of Russell Wilkins. Your petitioner then filed a motion for summary judgment (R. 15) under Rule 56 of the Rules of Civil Procedure, upon the following grounds:

> "(1) That the "Optional Contract" was signed by J. A. Scorup, president of the defendant corporation, without any authority from the stockholders of said corporation and without any authority from the board of directors of said corporation, and the signing and delivery thereof was not the act of, or binding upon the corporation.
>
> (2) That the said "Optional Contract" is so uncertain and indefinite in its terms and provisions that the same does not constitute a valid offer so that an acceptance thereof could create a contract between the parties.
>
> (3) That if the offer contained in said "Optional Contract" was possible of acceptance, plaintiffs failed to accept said offer within the time fixed therein, or in accordance with the terms and conditions thereof.
>
> (4) That plaintiffs rejected the offer contained in said "Optional Contract"."

Said motion was argued at length and by the court sustained (R. 40). Respondents appealed to the United States Circuit Court of Appeals of the Tenth Circuit, and on March 8, 1943, said judgment was reversed, the said court holding and deciding:

(a) That under the law of Utah the notice (R. 62) of special stockholders' meeting held July 12, 1941, mailed to each stockholder, constituted personal service of said notice and that said meeting held pursuant to said notice was legally held.

(b) That notwithstanding Sec. 18-2-16 Rev. Stat. Utah 1933, which provides that the act of the board of directors in

selling or otherwise disposing of all the assets of a corporation shall not be valid or binding on the corporation until confiremd by vote of a majority of the stock entitled to vote at a meeting of the stockholders duly called to consider such action of the board, the stockholders of petitioner, on the principle of agency, could authorize the president to enter into said "Optional Contract" without the necessity of any action by the board of directors.

(c) That "It is true, as argued by defendants, that the "Optional Contract" was not binding on the corporation because the president was not authorized to execute such a contract. It was, however, a continuing offer to sell which ripened into a binding contract when it was accepted in writing by the plaintiffs on August 27, 1941".

(d) That notwithstanding the "Optional Contract" provides that "When buyer accepts option he agrees to make first payment of $74,000", the letter of August 27, 1941, even though a conditional tender, was nevertheless a tender of the full purchase price, although no money was paid, and entitled respondents to a conveyance of the assets.

(e) That the agreement to meet on September 2d prevented the letter of August 27, 1941, even though said letter was a conditional acceptance, from terminating negotiations between the parties.

Statement of Basis of Court's Jurisdiction.

I.

Under Rule 38, paragraph 5 of the rules of this Court, it is in substance provided that a Writ of Certiorari will be granted by this Honorable Court when a Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, and it is submitted that the decision of the Circuit Court of

Appeals in the instant case has, in effect, construed the State statutes and in so doing has violated the plain provisions of said statutes, and said construction is in conflict with the applicable decisions of the Supreme Court of the State of Utah.

II.

Under Section 347 U. S. C. A. (Judicial Code Sec. 240, as amended) this Court has discretionary power to review the judgment of the Circuit Court of Appeals not limited or controlled by the specific provisions of said Rule 38, and because of manifest errors in the decision of the Circuit Court of Appeals, which is contrary to the decision of this and other courts on similar questions and which, as to the law of the State of Utah with reference to corporations, creates doubt and confusion, this case is one in which this Court should exercise its discretion and grant a hearing to your petitioner.

Questions Presented.

The questions presented by this petition are whether the Circuit Court of Appeals erred in holding and deciding:

1. That the mailing to each stockholder of the notice of the special meeting of stockholders of July 12, 1941 constituted personal service of said notice on each stockholder, as required by Sec. 18-2-41 Rev. Stat. Utah 1933, so as to make said meeting legal and valid.
2. That under Sec. 18-2-16 Rev. Stat. Utah 1933 stockholders, without any action of the board of directors, could confer authority on J. A. Scorup, as agent of the corporation, to sell all the assets of the corporation.
3. That although J. A. Scorup was not authorized to execute said "Optional Contract," nevertheless, said "Optional Contract" was a continuing offer to sell, which ripened into a binding contract when it was

accepted in writing by respondents by their letter of August 27, 1941.

4. That the letter of August 27, 1941, constituted an unconditional acceptance of the offer contained in said "Optional Contract" notwithstanding said letter tendered payment of the purchase price on condition: (a) that "*satisfactory and proper conveyance*" be made by the Cattle Company; (b) that such conveyance include, not only all assets owned by said company on the date of said option, but all assets owned "*thereafter*"; (c) that such conveyance include "*approximately 3,000 calves,*" all of which conditions are beyond and outside the terms of the offer contained in the "Optional Contract."

5. That if the letter of August 27, 1941 was a conditional acceptance, the agreement of the parties to meet for further discussions after said date prevented said conditional acceptance from constituting a rejection of the offer contained in said "Optional Contract" which terminated all negotiations, notwithstanding any understandings or agreements after a rejection by a conditional acceptance, in order to be valid, would have to be in writing to comply with the statute of frauds.

6. That said letter of August 27, 1941 constituted an unconditional acceptance of said "Optional Contract," notwithstanding the uncontradicted evidence shows that no payment accompanied said letter, as required by the "Optional Contract," and also shows that if capable of being accepted the offer contained therein had been rejected by counter proposals prior to August 27, 1941, which in legal effect terminated all negotiations between the parties.

7. In reversing the lower court when, as a matter of law, the "Optional Contract," because of its uncertainty and indefiniteness, was insufficient to constitute a valid offer which, even if accepted, could form the basis of a contract.

8. In reversing the lower court when, as a matter of law, if the "Optional Contract" was sufficiently cer-

tain to be accepted, respondents by their counter offers contained in other contracts proposed by them, rejected the offer contained in the "Optional Contract."

Reasons Relied On for the Allowance of the Writ.

The Write of Certiorari should be granted for the following reasons:

I.

Said decision of the Circuit Court of Appeals on the question of the powers of stockholders and directors in the conduct of corporate business is in conflict with the decisions of the Supreme Court of Utah and will produce such uncertainty among stockholders and officers of corporations, and among the general public, as to the respective powers and functions of stockholders and directors in entering into contracts on behalf of corporations, that there should, in the public interest, be a clarification of the law.

II.

The said decision of the Circuit Court of Appeals is so contradictory in its reasoning and so uncertain in its implications, that it furnishes no reasonably certain guide to the trial court as to the law of the case (if the case is to be tried) on the points decided by said Circuit Court of Appeals. Furthermore, said Circuit Court of Appeals entirely ignores other controlling law points presented to it, viz:

(a) That said "Optional Contract" is void for uncertainty and indefiniteness.

(b) That by the offer of counter proposals the offer contained in said "Optional Contract" (assuming it to be valid) constituted a rejection of such offer and terminated all negotiations between the parties.

(c) That if, as the court holds, J. A. Scorup was not authorized to sign the "Optional Contract," it was void from its inception and could not form the basis of a contract, even if unconditionally accepted.

That any one of said questions rightly decided would have entitled petitioner to an affirmance of the judgment of the lower court.

III.

That the property mentioned in said "Optional Contract" consists of large areas of land as well as cattle and other personal property of great value, and the decision of the Circuit Court of Appeals to the effect that if the letter of August 27, 1941 was a conditional acceptance, the agreement of the parties to meet again on September 2nd, constituted a continuation of negotiations, is contrary to the decisions of this and other courts that a conditional acceptance completely terminates all negotiations; and said decision also ignores the rule of law, that after such termination it would be necessary, in order to bind the corporation, that any understanding or agreement be in writing, in order to comply with the statute of frauds.

IV.

This is a case in which the liability or non-liability of petitioner can and should be determined as a matter of law, from the record upon which the motion for summary judgment is based. Petitioner most respectfully represents that it would be against justice and right to compel petitioner to incur the expense of bringing witnesses from distant places, and the expense of a protracted trial if, as a matter of law, respondents have no case entitling them to go to a jury.

WHEREFORE petitioner prays that a Writ of Certiorari issue by this court, directing that all proceedings in said

cause before the Circuit Court of Appeals for the Tenth Circuit be duly certified, and that the judgment of said court upon the hearing of this petition be set aside and the judgment of the United States District Court for the District of Utah affirmed.

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Attorneys for Petitioner.

SUPPORTING BRIEF.

Under its discretionary power it is in order for this court to consider not only the particular grounds advanced by the Circuit Court of Appeals for its decision, but to consider other grounds not advanced by that court, so that there may be a complete determination.

Cole v. *Ralph,* 252 U. S. 286; 64 L. Ed. 567.

Section 18-2-20 Rev. Stat. Utah 1933 contains, among others, the following provision:

> "The corporate powers of a corporation shall be exercised by the board of directors."

This is but an affirmation of the common law rule, and under the common law officers and directors of a solvent corporation had no power to sell all its property, over the objection of a minority stockholder.

Fletcher on Corp., Vol. 6, Sec. 2947;
Swartz v. *Inspiration etc. Min. Co.,* 15 Fed. Supp. 1030.

However, this common law rule has been modified by statute in most states and in Utah by Sec. 18-2-16 Rev. Stat. Utah 1933 which, among other things provides:

> "When the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors in selling or otherwise disposing of such property shall not be valid or binding on the corporation until confirmed by a vote of a majority of the stock entitled to vote at a meeting of stockholders duly called to consider such action of the board."

In the case at bar there is no provision in the articles of incorporation for the sale of the corporate property, therefore said Sec. 18-2-16 applies and said statute contem-

plates that there shall be (1) action by the board of directors; (2) confirmation of such action at a duly called stockholders' meeting. The Supreme Court of Utah, and other courts, have recognized the necessity of complying with this requirement.

Beggs v. *Myton Canal Co.*, 54 Utah 120; 179 P. 984;
Boston Acme, etc. Co. v. *Clawson*, 66 U. 103; 240 P. 165;
Cyclone Drill Co. v. *Zeigler*, 99 Ohio St. 151; 124 N. E. 131;
Lord v. *Yonkers Fuel etc. Co.*, 99 N. Y. 547; 2 N. E. 909.

In the instant case the court held:

> "It is urged by the defendants that under the Utah law the sale of the assets of a corporation is valid only when first authorized by the board of directors, and thereafter confirmed by a vote of the requisite number of stockholders. All this statute says is that a sale of the assets of a corporation by the board of directors is not binding on the corporation until confirmed by the stockholders. It does not say that the stockholders may not, in the first instance, authorize and direct the sale of the assets. A corporation belongs to the stockholders. The officers are merely the managing agents for the corporation. The powers of an officer or agent of a corporation to bind the corporation are governed by the general law of agency."

This holding is tantamount to a declaration that the stockholders have power to authorize the president to sell all the assets of the corporation without any action of the board of directors, and is contrary to the decisions of the Supreme Court of Utah above cited, and is likewise contrary to the decisions of said court that stockholders cannot exercise the corporate powers, but that said powers must be exercised only by the board of directors.

Lockwitz v. *Pine Tree Min. Co.*, 37 U. 349; 108 P. 1128;
Anderson v. *Irrigation Co.*, 51 U. 137; 169 P. 168.

In the last case the court declares:

> "the authority to manage and control the corporation and conduct its business is left exclusively to the board of directors and not to the stockholders as such."

The Supreme Court of Utah has also declared that acts done at a meeting of a quorum of directors without notice to absent members, are void.

> *Singer* v. *Salt Lake etc. Co.*, 17 U. 143; 53 Pac. 1024;
> *Hatch* v. *Min. Co.*, 25 U. 405; 71 P. 865;
> *McCarrick* v. *Min. Co.*, 49 U. 353; 164 P. 478.

May we again suggest that although some members of the board of directors were in attendance at the meeting of July 12, 1941, there was no notice that a directors' meeting would be held on that date and two directors were not present and did not consent to the holding of any directors' meeting. (R. 19, 23.)

The Circuit Court of Appeals also held that the meeting of the stockholders of the Scorup-Somerville Cattle Company, held July 12, 1941, was "duly called," and if, as a matter of law, it was competent for the stockholders to authorize J. A. Scorup to act for the corporation in the disposition of all the assets of the corporation, then it becomes important to determine whether the stockholders' meeting of July 12, 1941 was valid, and that depends on whether or not proper notice was given.

Said meeting was a special meeting, because under Article 23 of the articles of incorporation annual meetings of the stockholders are held on the first Tuesday of January of each year (R. 35, 36).

The corporation has no by-laws (R. 68), but Article 22 of the articles of incorporation provides:

> "Special meetings shall be called and notice thereof given in the manner provided by law." (R. 35.)

Sec. 18-2-41 Rev. Stat. Utah 1933, provides:

> "When not otherwise specified in the articles of incorporation or by-laws, special meetings of stockholders may be called by the president, or by any three directors, or by any number of stockholders owning not less than one-third of the outstanding stock entitled to vote at such meeting, and notice thereof shall be given by *personal service* of the notice upon each stockholder at least five days before the date for the meeting, or by advertisement, etc."

There was no advertisement of the notice and, as stated in the summary statement, the notice mailed to each stockholder was the only notice given of the meeting of July 12, 1941. The court held that such mailing of said notice constituted personal service.

"Personal service" means the actual delivery of notice to the person to whom it is directed.

> *Thisler* v. *Little*, 86 Kan. 787; 121 P. 1123;
> *Holiness Church* v. *Metropolitan Church* (Cal.) 107 P. 633;
> *Scanlon* v. *Scanlon*, 154 Iowa 748; 135 N. W. 634;
> *McKenzie* v. *Boynton*, 19 N. D. 531; 125 N. W. 1059.

Mailing a copy of notice is not personal service."

> *Seal* v. *Banes*, 168 Okla. 550; 35 P. (2) 704;
> *Dalton* v. *St. Louis, etc. Ry. Co.*, 113 Mo. A. 610; 87 S. W. 610.

The statute requiring notice to stockholders, where the corporation sells its entire property or assets, is mandatory.

> *Cyclone Drill Co.* v. *Zeigler*, 99 Oh. S. 151; 124 N. E. 131;

Sections 104-43-2 and 104-43-3 Rev. Stat. Utah 1933, and the case of *Greenwood* v. *Bramel*, 54 U. 1, 174 P. 637, relied

upon by the Circuit Court of Appeals in its decision, are not applicable to the question of personal service of notice of stockholders' meetings. Said sections are a part of the Code of Civil Procedure relating to the service of papers in connection with cases pending before the courts and have no application to the giving of notice of stockholders' meetings.

Sec. 104-43-2 provides:

> "The service may be personal by delivery to the party or attorney on whom the service is to be made, *or it may be as follows:*
> (1) If upon the attorney, etc. * * *
> (2) If upon a party it may be made by leaving a notice or other paper at his residence, between the hours of six o'clock A. M. and nine o'clock P. M. with some person of suitable age or discretion, or, if his residence is not known, by mailing as herein provided."

It is quite apparent from the first paragraph of this section that two forms of service are provided for, one "personal service," and the other "as follows," that is to say, by leaving at the residence or by mail. Said Sec. 104-43-3 is simply an additional provision that service by mail may be made where persons reside in different places. These statutes have nothing whatever to do with stockholders' meetings, and have no application whatever, except to proceedings in the courts. There is no decision of the Supreme Court of Utah on the question of what constitutes "Personal service" under the statute relating to special stockholders' meetings, therefore we rely on the authorities to which we have heretofore called attention.

On the question of the authority of J. A. Scorup to sign the "Optional Contract" the court declares:

> "The corporation could, as it did, direct the president to sell the assets of the corporation, and a contract executed by the president within the terms of the au-

> thority conferred would bind the corporation. It is true, as urged by defendants, that the "Optional Contract" was not binding on the corporation because the president was not authorized to execute such a contract. It was, however, a continuing offer to sell and ripened into a binding contract when it was accepted in writing by the plaintiffs on August 27, 1941."

Evidently the court concluded that the stockholders' meeting authorized J. A. Scorup to "sell the holdings," but that the "Optional Contract" was not binding on the corporation because the president was not authorized to execute an option contract. In other words, the court recognizes the rule, supported by the authorities, that the power to sell does not confer authority to grant an option.

Swift v. *Erwin,* (Ark.) 148 S. W. 267;
Field v. *Small,* 17 Colo. 386; 30 P. 1034;
Dawning Inv. Co. v. *Coolidge,* 46 Colo. 345; 104 P. 392;
Tibbs v. *Zirkle,* 55 W. Va. 49; 46 S. S. 701;
Mack Realty Co. v. *Beckley,* 107 W. Va. 290; 148 S. E. 122.

But it nevertheless holds that this unauthorized contract ripened into a valid contract, not by any subsequent act of the corporation in ratifying or confirming it, but by the act of the respondents in accepting the option by the letter of August 27, 1941. If the "Optional Contract" had no validity because unauthorized, how could it be a continuing offer? No further comment is necessary on this reasoning of the court.

The "Optional Contract" described certain specified property, followed by the provision; "and any and all other property, personal or real, *now owned* by the seller". It did not provide for a "satisfactory and proper conveyance" of assets. It did not mention any number of calves to be sold, and it specifically provided: "When

buyer accepts option he agrees to make first payment of $74,000." The letter of August 27, 1941, varies from the terms of the offer, because it states that the tender of the purchase price, as provided in the "Optional Contract", which included the $74,000 which had to be paid when the offer was accepted (and the acceptance had to be by September 1st), is conditioned "*upon satisfactory and proper conveyance by the Scorup-Somerville Cattle Company to the undersigned* of all of the assets owned by said company on the date of said option *and thereafter * * * including approximately 3000 calves*". This is clearly a variance from the offer and terminated all negotiations between the parties.

Weaver v. *Burr,* 31 W. Va. 736; 8 S. E. 743;
Minneapolis, etc. Ry. Co. v. *Columbus Roll. Mill Co.,* 119 U. S. 149; 30 L. Ed. 376;
Beaumont v. *Prieto,* 249 U. S. 554; 63 L. Ed. 770;
Rothstein v. *Edward* (9th C. C. A.) 94 Fed. (2) 488;
Vergonis v. *Vasseleou,* 105 Wash. 441; 178 P. 463;
Columbia Malting Co. v. *Clausen Flanagan Corp.* (2 C. C. A.) 3 Fed. (2) 547;
Lewis v. *Johnson,* 123 Minn. 409; 143 N. W. 1127;
Rahm v. *Cummings,* 131 Minn. 141; 155 N. W. 201;
Darby v. *James* (8th C. C. A.) 100 Fed. 224;
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Neer v. *Lang,* 252 Fed. 575.

The court not only holds that the acceptance by the letter of August 27, 1941, was unconditional and absolute, but further declares:

> "The most that can be said is that the tender of payment made at that time was conditional. The tender was made, however, of the full purchase price, not the initial payment of $74,000 called for in the contract. Certainly, when plaintiffs tendered the full purchase

price they would be entitled to demand proper conveyance of the assets for which they were paying."

The court disregards the fact that under the terms of the "Optional Contract" something more than a mere conditional tender was necessary to entitle respondents to a conveyance. If the letter of August 27, 1941, constituted a conditional tender of the entire purchase price, respondents still failed to make payment of the $74,000 when the letter was delivered, and which was to be paid before respondents were entitled to any conveyance. The following are the conditions upon which said tender was made, viz: (a) "satisfactory and proper conveyance" of all the assets; (b) delivery over of assets acquired by the corporation *after* the date of the option; (c) delivery of "approximately 3000 calves"; all of which conditions were beyond and outside of the provisions of the "Optional Contract". Respondents followed up the letter by offering the draft for $531,500 on August 31, 1941, which draft was on its face utterly worthless. The tender of the $74,000 on September 2, 1941, conceding that the money was then offered, was an ineffective act, after respondents had utterly terminated all negotiations by the conditional acceptance.

The Circuit Court of Appeals further holds that, even if the letter of August 27, 1941, was a conditional acceptance, it did not terminate negotiations, because all of the parties to the transaction elected to continue them. There is no evidence of any election to continue negotiations, except the agreement to meet again on September 2d, and the negotiations having been absolutely terminated by the conditional acceptance, the mere agreement to meet for further discussion could not revive these negotiations. (*Rothstein* v. *Edward,* 94 Fed. (2) 488; *Lewis* v. *Johnson,* 123 Minn. 409, 143 N. W. 1127. The whole transaction was dead and the only way there could be any binding obligation thereafter

assumed by the corporation, in order to comply with the statute of frauds, would be by written agreement (*Lewis* v. *Johnson, supra*).

The Circuit Court of Appeals ignores entirely the question of the insufficiency of the "Optional Contract" to constitute an offer by reason of its uncertainty, indefiniteness and ambiguity. Said "Optional Contract" provides:

> "The method of purchase is to be selected by the buyer on or before the first of September. When buyer accepts option he agrees to make first payment of $74,000 on or before the first of September, which will make the total sum of $75,000. Further payment shall be made either on the basis of the delivery of cattle or the formal turning over of the assets of the seller."

Let us analyze these provisions.

1. If "further payment" is to be made, either on the basis of the delivery of cattle or the formal turning over of the assets of the seller, who is to decide on which basis the "further payment" shall be made? "The method of purchase is to be selected by the buyer", but the "method of purchase" has reference to the buyer's right to exercise one option or the other. These words certainly cannot be construed to mean that the buyer shall have the right to select the "basis" on which "further payment" shall be made, because as to both options the provision for "further payment" is the same, that is, it may be made on one "basis" or the other, no matter which method of purchase is selected. The matter of determining the "basis" was evidently left for future agreement between the parties. If so, the agreement is incomplete, for no matter which option is exercised no one can determine from the instrument on which "basis" the buyer is obligated to make "further payment", or on which "basis" the seller is entitled to demand "further payment."

2. If "further payment" is to be made on the "basis" of the delivery of *cattle*, what is meant by "further payment"? Does it mean the entire balance of the purchase price upon delivery of *all* the cattle? If so, when were the cattle to be delivered? Or does "further payment" mean payment from time to time as cattle are delivered? If so, when are such deliveries to be made? What amounts shall be paid from time to time? Shall the several amounts so said equal the value of the cattle as delivered; or shall they be in such amounts as the buyer may elect to pay, or the seller shall elect to demand? Shall such payments be in such amounts as the parties may agree upon? In making the "further payment" is the value of the ranches to be taken into consideration? If so, how much of the "further payment", on the "basis of the delivery of cattle" is the buyer obligated to pay, and the seller obligated to apply, on the purchase price of the ranches? How could "further payment on the basis of the delivery of cattle", if that phrase means installment payments, constitute a "basis" for determining what amount the seller was entitled to receive on the price of the land?

3. If "further payment" is made on the "basis" of "the formal turning over of the assets of the seller", what does that mean? Does it mean that a bill of sale shall accompany delivery of the cattle and that a conveyance and assignment of all interest in the real property shall be executed and delivered by the seller? When shall the formal turning over of the assets occur, and where? Do the words "formal turning over of the assets" obligate the seller to furnish abstracts of title to the real property? Could the buyer refuse to make the "further payment" if the seller refused to furnish such abstracts?

If the court should give a definite meaning to all of these incomplete, uncertain and indefinite provisions of the

"Optional Contract", it would make a contract for the parties which they did not make themselves. Wilkins himself recognized that the contract was so vague, obscure and incomplete that the parties could not intelligently act upon it, for when he and his attorney and partner, Newton, left Denver for Moab, about August 24th, they carried with them a new draft of a contract containing provisions as to the place and terms of delivery of the cattle, which they presented to Scorup (R. 117). Later Wilkins presented still another contract setting forth in greater detail the terms and conditions not mentioned in the "Optional Contract", and this they also presented to Scorup for his signature (R. 120). This likewise was not signed. Why all this activity to secure a new and different contract if they did not consider the "Optional Contract" so uncertain as to be useless as a definition of the rights of the parties?

> "The law is too well settled to admit of a doubt, that in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be estimated to a reasonable degree of certainty what they mean. And, if the agreement is so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court, nor the jury, can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon at law."
>
> Swartz *vs.* Minn. Co., 15 Fed. Supp. 1030-1037.

> "When parties, in making an agreement, fail to use language sufficiently definite to enable the court to ascertain to a reasonable certainty their intention, such agreement does not constitute an enforcible contract in law, nor will it support an action for damages based upon a breach thereof."
>
> *Central Mort. Co.* v. *Ins. Co.*, 43 *Okla.*, 33; 143 P. 175;
>
> *Royal Bank of Canada* v. *Williams*, 222 N. Y. S. 425;

Jordan v. *Buick Motor Co.*, 75 Fed. (2d) 447;
Oakland Motor Co. v. *Indiana Motor Co.* (7th (C. C. A.), 201 Fed. 499;
Forster v. *Davis Motor Co.*, 186 Okla. 395; 98 P. (2) 17;
Pfeut v. *Michaux*, 231 Mich. 500; 204 N. W. 86;
Factor v. *Peabody Tail. System*, 177 Wis. 238; 187 N. W. 984.

The Circuit Court of Appeals entirely ignored the question of the legal effect of the counter proposals made by the respondents prior to the letter of August 27, 1941, when they submitted new contracts for the signature of Scorup. The counter offers constituted a rejection of the offer contained in the "Optional Contract", and such rejection was irrevocable.

Jones v. *Moncrief Cook Co.*, 25 Okla. 856; 108 P. 403;
Henry v. *Black*, 214 Pa. 620; 63 Atl. 250.

As stated by this Court:

> "A proposition to accept on terms varying from those offered is a rejection of the offer, and a substitution in its place of the counter proposition. It puts an end to the negotiation so far as the original offer is concerned. The original offer thereby loses its vitality and is no longer binding between the parties; hence the party who has submitted the counter proposition cannot, at his own option, ratify and accept the original offer which he has once virtually rejected."
>
> *Minneapolis etc. R. Co.* v. *Columbus Roll, Mill. Co.*, 119 U. S. 149; 30 L. Ed. 376.

The fact that by its terms the "Optional Contract" was *irrevocable*, and that it was based on a consideration, does not make this principle inapplicable (*Jones* v. *Moncrief Cook Co.*, *supra*), because the only difference between an option where consideration is paid and where there is no consideration is that in the one case the offer cannot be

withdrawn during the period for which it is given, while in the other it can be withdrawn at any time, but in either case the offer can be rejected by the offeree at any time before it has expired or is withdrawn.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision in the instant case on questions of local law may be made to conform to the decisions of the Supreme Court of the State of Utah, and in order that the other numerous errors in the decision of said Circuit Court of Appeals may be corrected and justice done.

For these reasons it seems that a Writ of Certiorari should be granted and that this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit and finally reverse the same.

Respectfully submitted,

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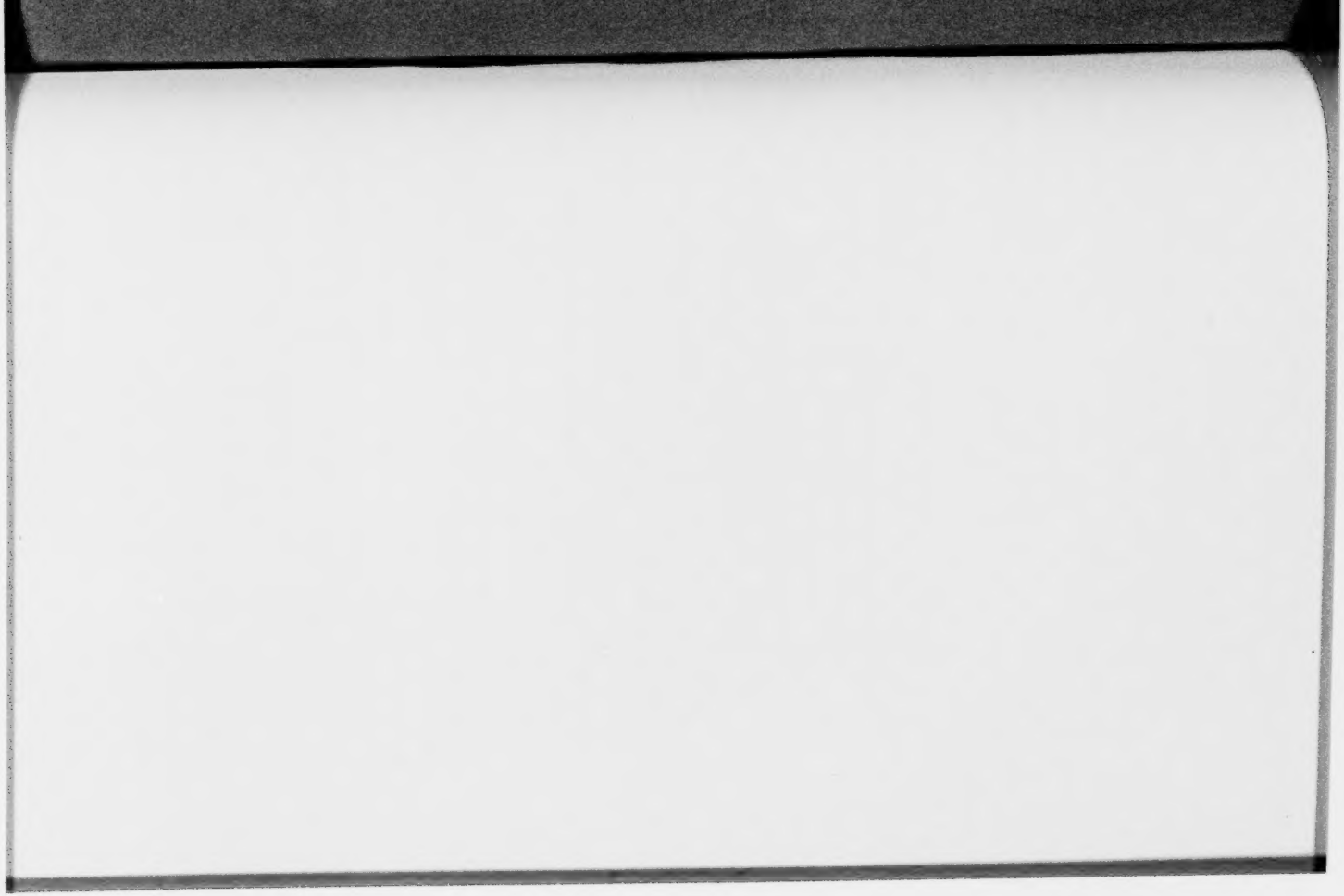

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 951

SOOBUP-SOMERVILLE CATTLE COMPANY,
a corporation,

Petitioner,

vs.

J. LEE MERRION and RUSSELL WILKINS, a co-partnership, doing business as MERRION & WILKINS,

Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITIONER'S PETITION FOR CERTIORARI

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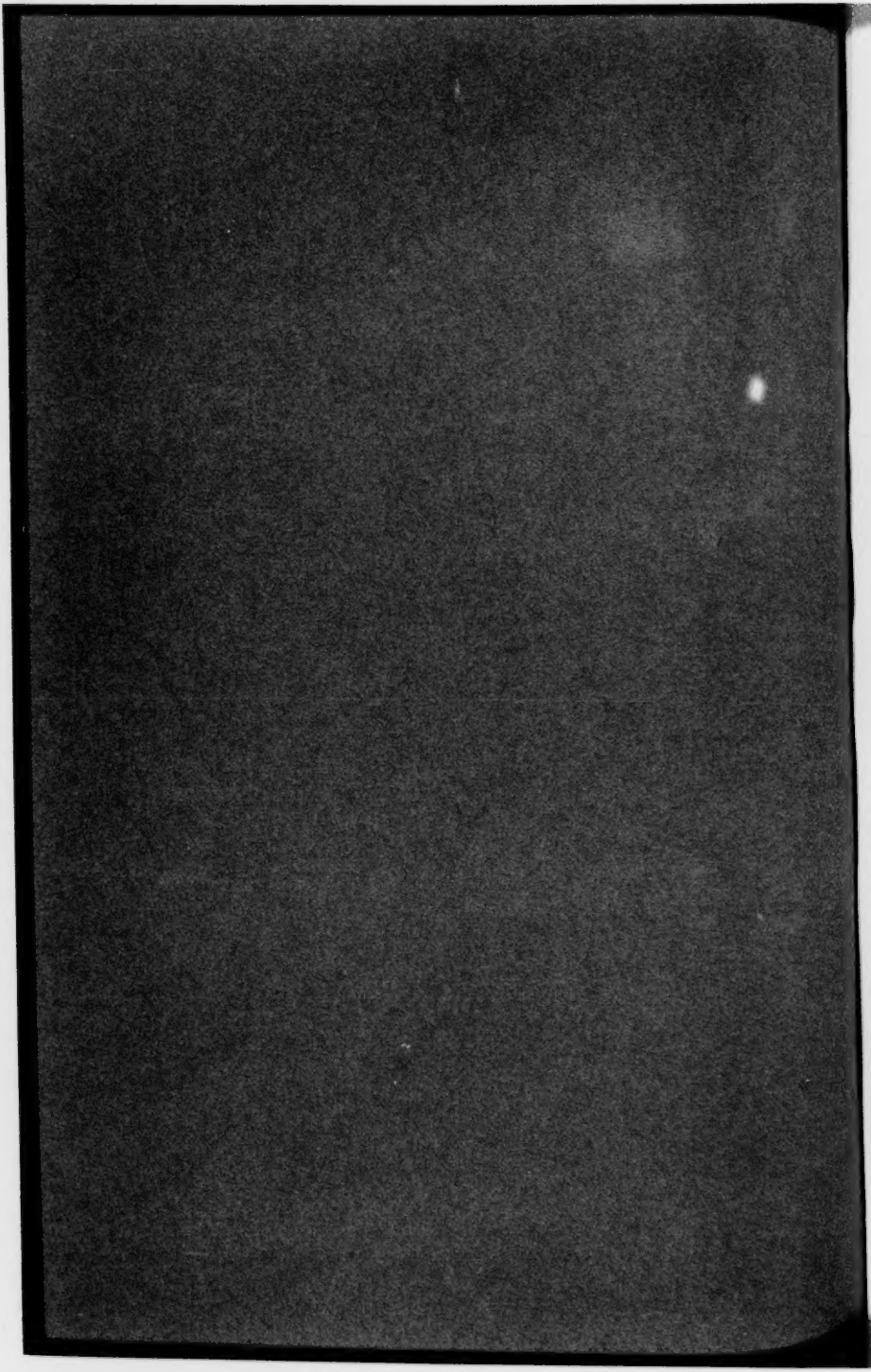

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 951

SCORUP-SOMERVILLE CATTLE COMPANY,
a corporation,
PETITIONER,

vs.

J. LEE MERRION and RUSSELL WILKINS, a co-partnership, doing business as MERRION & WILKINS,
RESPONDENTS.

WILLIAM K. SOMERVILLE, ANNIE SOMERVILLE and ANNIE SOMMERVILLE, as Guardian of the Person and Estate of Richard D. Somerville, a Minor,
INTERVENORS.

BRIEF OF RESPONDENTS OPPOSING PETITIONER'S PETITION FOR CERTIORARI

SUMMARY STATEMENT

Scorup-Somerville Cattle Company is a corporation engaged in the cattle and ranching business in the State of Utah. J. A. Scorup is, and since the company was created, has been its President and Manager. He has always been the "boss of the outfit." He and his wife, daughters, nephews and nieces own 62½% of the company's outstanding stock.

Early in the year of 1941 Mr. Scorup told James G. Brown, a real estate and cattle broker, that the company wanted to dispose of its assets. About July 1, 1941, at the instance of Brown, he discussed the sale of the company's

property with Wolf & Kemper, cattle buyers of Denver, Colorado, but they reached no understanding.

Some time prior to July 5, 1941 ((the date of the Ellen Scorup proxy) (R. 62)) Mr. Scorup instructed Mr. McConkie, the Secretary of the company, to call a stockholders meeting to consider the sale of the company's assets. The Secretary prepared a written notice of meeting as follows:

> "Dear Stockholder:
>
> "There will be a meeting of the Stockholders of the Scorup-Somerville Cattle Company at the home of J. A. Scorup, Moab, Utah, at 2 P. M. July 12, 1941, to consider the offer to purchase the holdings of the Scorup-Somerville Cattle Co. and any other or further buisness that may properly come before the Stockholders.
>
> "Very truly yours,
>
> "Secretary."

In accordance with his custom when giving notices of meetings, the Secretary mailed a copy of the written notice to each stockholder at his address. In response, ten of the eighteen stockholders of the company, representing 220,765 shares out of a total of 253,225 shares outstanding, assembled in a meeting at the home of J. A. Scorup on July 12, 1941. The minutes of that meeting, with certain immaterial omissions, are as follows:

> "July 12, 1941
>
> "The stockholders of the Scorup-Somerville Cattle Company met July 12th, 1941. With the Board of Directors. Present at the meeting were J. A. Scorup, Annie Somerville, Veda Nelson, Harve Williams, James M. Scorup, Edith Scorup, Andrew Somerville, Laura Scorup, and Carroll J. Meador as proxy for Wm. K. Somerville, Edith Scorup proxy for Ellen Scorup, and clerk W. R. McConkie.
>
> * * * * * *
>
> "Mr. Scorup reported that he had offered to sell the outfit for $532,500.00 * * *.
>
> "After some discussion it was moved by Edith Scorup and seconded by James M. Scorup that the presi-

dent be authorized to sell the holdings for $532,500.00 on range delivery or tally the cattle over at $40.00 per head for all born prior to 1941 and a fair price for the 1941 calves; $50.00 per head for 150 horses; $50.00 per acre for farm land, $3.00 per acre for winter grazing land, $5.00 per acre for summer grazing land. Motion carried all voting aye except Veda Nelson who voted no.

* * * * * *

"(Signed) J. A. Scorup President

"(Signed)

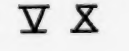
"W. R. McConkie Secretary." (R. 58, 59- 60)

By previous arrangement with Brown, Mr. Scorup met Mr. Wilkins, a partner of Merrion & Wilkins, respondents herein, in Salina, Utah, where they entered into negotiations looking to the sale and purchase of the assets of Scorup-Somerville Cattle Company, petitioner herein. On August 2, 1941 Mr. Scorup on behalf of his company made a proposition to Wilkins which Wilkins said they would take if inspection justified acceptance. (R. 79) Scorup reported to Wilkins that he had authority to enter into the contract he subsequently signed on behalf of his corporation. (R. 29) The so-called "Optional Contract" was prepared, without benefit of legal counsel, and after it had been read and corrected by Scorup and Wilkins, it was executed by the parties in the following form:

"Optional Contract.

"This option made the second day of August, nineteen hundred and forty-one by and between the Scorup and Somerville Cattle Company of Moab, San Juan County, Utah, hereinafter called the Seller and Merrion Wilkins of the city and county of Denver hereinafter called the Buyer.

"Witnesseth: That for and in consideration of the sum of $1,000 in hand paid, receipt of which is hereby acknowledged, Seller does hereby grant to the Buyer an irrevocable option to purchase of approximately 9,000 cattle branded



All calves, horses, mules, other ranch stock, forest permits, Taylor grazing permits, leases, feed now on hand, or growing, trucks, pick-ups, automobiles, farm and ranching machinery, buildings, water rights, ditch rights, and any and all other property personal or real, now owned by the Seller and not specifically mentioned withheld for the total sum of $532,500.00.

"Alternate Option: Seller agrees on the tally branding and delivery of 9,000 cattle at $40 a head and the tally of all 1941 calves at $20 a head. 5,000 of these cattle to be delivered at the railroad. Option to purchase is hereby granted approximately 1,000 acres of irrigated land at $50 an acre 17,000 acres @ $5.00 called the Guyser pasture and 10,000 acres of range land @ $3.00 and 150 head of horses at $50 a piece. Above contract includes permits and rights mentioned in first part of option. The method of purchase is to be selected by the Buyer on or before the first of September. When Buyer accepts option he agrees to make first payment of $74,000 on or before the first of September, which will make the total sum of $75,000. Further payment shall be made either on the basis of the delivery of cattle or the formal turning over of the assets of the Seller. If Buyer fails to go through with purchase price of option payment shall be retained by the Seller as liquidated damages against the Buyer.

"Buyer: Merrion & Wilkins
Russell Wilkins

"Seller: Scorup-Somerville Cattle Company
By J. A. Scorup.

"We have set our hands unto this understanding and agreement the second day of August nineteen hundred and forty-one by and between S. and S. Cattle Company (Seller) and Merrion & Wilkins (Buyer).

"Witnesses:

"James G. Brown.

"Rulon Fairbourn." (R. 84-85)

While the offer to sell was in full force and effect, Wilkins conducted an investigation of the company's property, in the course of which he discussed the deal with several of its stockholders and officers, no one of whom offered a word of disapproval or repudiation of what Mr. Scorup had done in the name of the company. Wilkins, realizing the enormity of the task of getting approximately 9,000 head of cattle off the extensive properties where they ranged, discussed with Mr. Scorup from time to time during the month of August ways and means of delivering the property and of consumating the purchase. However, nothing came of these conversations and no further documents were signed by the parties. (R. 86-89)

On August 27, 1941 respondents accepted the proposition previously made by petitioner and delivered to petitioner the following document:

"August 27, 1941.

"Scorup-Somerville Cattle Company, Moab, Utah.

"Attention: Mr. J. A. Scorup, President.

"Gentlemen: On August 2, 1941, the Scorup-Somerville Cattle Company granted to Merrion and Wilkins, a co-partnership doing business in Denver, Colorado, a certain Option, hereinafter called Option No. 1, dated August 2, 1941 (which option was executed on behalf of said company by its president, J. A. Scorup), to purchase approximately 9,000 cattle and all the real and personal property and other assets of said company for a total purchase price of $532,500.00.

"An alternate option, dated the same date, was also granted by the Scorup-Somerville Cattle Company to Merrion and Wilkins to purchase all of the assets of said company consisting of certain real and personal property and approximately 9000 cattle, 5000 thereof to be delivered to the railroad and the balance to be tally branded, at a total purchase price to be computed on the basis of the number of cattle actually delivered and the number of acres or real property conveyed.

"Said option, according to their terms, each expire September 1, 1941.

> "We, the undersigned, on this 27th day of August, 1941, hereby notify the Scorup-Somerville Cattle Company and its President, J. A. Scorup, that we hereby exercise Option No. 1, hereinbefore described, and we hereby tender to the Scorup-Somerville Cattle Company payment of the purchase price, as provided in said option, upon satisfactory and proper conveyance by the Scorup-Somerville Cattle Company to the undersigned of all of the assets owned by said company on the date of said option and thereafter, including 1000 acres, more or less, of irrigated land, 17,000 acres, more or less, of pasture land, 10,000 acres, more or less, of range land, approximately 9000 cattle, approximately 3000 calves, etc.
>
> "Very truly yours,
>
> "Merrion and Wilkins
>
> By Russell Wilkins (sgd.)" (R. 90)

On August 31, 1941, Wilkins tendered Scorup a draft for $531,500.00, being the total unpaid balance due on the sale, but Scorup refused to accept the draft, because he claimed it was "illegal" and "no good," the 31st of the month being Sunday. (R. 94) Upon parting Sunday afternoon, August 31, 1941, Scorup and Wilkins agreed to meet again the following Tuesday in Moab to talk some more and "go on with the option." (R. 95) Monday, September 1, 1941, was Labor Day, a legal holiday in Utah. On Tuesday, September 2, 1941, Wilkins again called on Scorup pursuant to the appointment they had made and reiterated respondents' election to accept the proposition outlined in "Option No. 1" and tendered $74,000.00 in cash pursuant to the terms of the "Optional Contract." Petitioner refused to accept the tender and Scorup and his attorneys walked away, stating that "the time was up."

Prior to trial Scorup-Somerville Cattle Company (petitioner herein) moved for summary judgment and supported its motion by the pleadings, affidavits and provisions of its articles of incorporation and by depositions taken in anticipation of trial. (R. 15)

Merrion and Wilkins (respondents herein) objected to the motion on the ground that the record presented a case

which did not come fairly within the purview of Rule 56 of the Federal Rules of Civil Procedure. (R. 38-39)

The trial court granted the motion and made and entered summary judgment for Scorup-Somerville Cattle Company. Merrion and Wilkins appealed to the Tenth Circuit Court of Appeals. That court entered its judgment March 8, 1943, saying:

> "It is our conclusion that the issues presented by the pleadings could not be determined on a motion for summary judgment, and that the court erred in entering such judgment."

Italics used in quoted portions of brief have been supplied by us.

BASIS OF JURISDICTION

Petitioner urges that the Tenth Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, and that the decision of the Circuit Court of Appeals creates doubt and confusion with reference to the laws of corporations in the State of Utah.

It is suggested by respondents that a matter of corporate procedure in the State of Utah presents no question of such public importance as will justify the assumption of jurisdiction by the Supreme Court of the United States. This is especially true when, as here, the opinion of the Circuit Court of Appeals is not in conflict with any decisions of the State of Utah, but on the contrary is supported by them. Had the Supreme Court of Utah written the decision complained of by petitioner, it would not have reversed any of its previous opinions.

Petitioner also represents that the opinion of the Tenth Circuit Court of Appeals is "uncertain in its implications," and that said court ignored certain law points presented by petitioner at the argument. Petitioner's objection goes to what it asserts is the uncertainty of an offer and its acceptance. The Tenth Circuit Court of Appeals considered the evidence and the arguments of petitioner which it reiterates here, and then decided there was a continuing offer and an unconditional acceptance thereof. The Supreme Court of the United States will not grant certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures*

Corporation v. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273. If petitioner had fault to find with the opinion on this score, it should have filed a motion with the Circuit Court of Appeals for a rehearing rather than seek such relief in this court under the guise of petition for certiorari.

ARGUMENT

Points Relied On By Respondents

1. There is nothing in petitioner's brief or in the record to show that the decision of the Tenth Circuit Court of Appeals either conflicts with or introduces confusion into the corporation laws of the State of Utah. The ruling of the Circuit Court of Appeals that the meeting of the stockholders of the corporation authorizing the sale of petitioner's assets was properly noticed and held, is not in conflict with any statute of the State of Utah or any decision of the Supreme Court of the State of Utah. Further, the ruling that the stockholders, as owners of the company (petitioner herein), had the power to authorize the President of the company to sell its assets is not in conflict with any statute of the State of Utah or any decision of the Supreme Court of the State of Utah.

a. Mailing of written notice to each stockholder of the special meeting of stockholders held July 12, 1941 constituted personal service of notice under the laws of Utah.

Tooele Meat and Storage Company v. Morse, 43 Utah 515, 136 P. 965;

Greenwood v. Bramel, 54 Utah 1, 174 P. 637.

b. The stockholders of a corporation have the right to authorize the sale of all the property of their corporation.

Hearst v. Putnam Mining Co., 28 Utah 184, 77 P. 753;

Cooper v. Light & Power Co., 35 Utah 570, 102 P. 202.

2. An innocent person when dealing with a corporation is not required to ascertain at his peril whether or not a directors' meeting was properly called and legally convened and whether or not a quorum was actually present at the meeting. The corporation is bound by its contract with a party who

deals with it in good faith, although there may be a defect in the authority of those acting for the corporation.

Huntington Roller Mills & Mfg. Co. v. Miller, 60 Utah 236, 208 P. 531;

Merchants National Bank of Boston v. The State National Bank of Boston, 77 U. S. 676, 19 L. Ed. 1008.

3. The "Optional Contract" and the offer therein contained are certain, but if there be ambiguity, evidence will be received to clarify it.

Chournos v. Evona Investment Co., 97 Utah 335, 93 P. (2d) 450;

Easton v. Thatcher, 7 Utah 99, 25 P. 728;

Cummings v. Nielson, 42 Utah 157, 129 P. 619.

4. The "Optional Contract" and the offer therein contained were exercised and accepted unconditionally by respondents, who tendered payment to petitioner in accordance with the terms of the "Optional Contract" and offer.

Turner v. McCormick, 56 W. Va. 161, 49 S. E. 28;

Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887;
Horgan v. Russell,

24 North Dakota 490, 140 N. W. 99;

McCormick v. Stephany, 61 N. J. Eq. 208, 48 Atl. 25;

Cates v. McNeil, 169 Cal. 697, 147 P. 944;

Restatement of The Law of Contracts, Par. 38, Illustrations and Comment on Page 46.

POINT 1, a.

The articles of incorporation of petitioner provide that special stockholders' meetings "shall be called and notice thereof shall be given in the manner provided by law." (R. 35) The law of Utah covering special stockholders' meeting is

found in *1933 Revised Statutes of Utah, 18-2-41,* which provides as follows:

> "* * * When not otherwise specified in the articles of incorporation or by-laws special meetings of the stockholders may be called by the president, by any three directors, or by any number of stockholders owning not less than one-third of the outstanding stock entitled to vote at such meeting, and notice thereof shall be given by personal service of the notice upon each such stockholder at least five days before the day fixed for the meeting or by advertisement * * *."

The stockholders' meeting of July 12, 1941 was called as usual, pursuant to order of J. A. Scorup, President of the company and the owner of more than one-third of the outstanding stock of the company entitled to vote at such meeting. (R. 52) The notice was in writing and named the time, place and purpose of the meeting. (R. 62) It was served in the customary manner by depositing it in the United States mails at Moab, Utah, some time prior to July 5, 1941, the date of the Ellen Scorup proxy, addressed to the respective stockholders of the company. (R. 61-62)

Under the Utah cases this was personal service. The policy of the Utah law is defined in the case of *Tooele Meat and Storage Co. v. Morse,* supra, where the Supreme Court of Utah in discussing service by mail under a Utah statute requiring personal service, said that if the notice required by the statute emanates from an authentic source and is such as to apprise the party to be notified fully of the whole substance of the matters concerning which the statute requires notice to be given, the notice is ordinarily held to be sufficient.

In *Greenwood v. Bramel,* supra, notice of judgment and notice of appeal were served by mail. The appeal was resisted on the ground that the notice was defective under the statute. The Supreme Court of Utah held that the notice was good. The statute under consideration provided:

> "* * * Notice of the entry of judgment must be given to the losing party by the successful party either *personally* or by publication, and the time of appeal shall date from the service of said notice. * * *"

Under this statute personal service in the alternative is required just the same as it is required under *1933 R. S. U. 18-2-41,* supra. In its opinion the court said:

> "The second notice in legal form was served by depositing it in the United States Post Office at Salt Lake City duly addressed to Warenski's counsel at Murray, on January 28, 1918. *We think this was personal service of the notice on Warenski,* as contemplated by Comp. Laws 1907, section 3331."

The purpose and requirements of the two statutes are the same and the interpretation of the Supreme Court of Utah of the one is persuasive, and perhaps binding, as to the other. Service by mailing is personal to the addressee and is an efficient and reliable method of apprising the addressee of the contents of the notice. That one statute pertains to notice of appeal and the other to stockholders' meetings makes no difference in principle.

POINT 1, b.

In Utah the stockholders of a corporation have the right and power to authorize the sale of all the property of their corporation. *Cooper v. Light and Power Co.,* supra. At page 581 of the Utah report, the court says:

> "As a general rule, a corporation having no public duties to perform has ordinarily the same power to sell, with the *consent* of its stockholders, all its property, including its privileges and franchises, except its franchise to be a corporation, that an individual has. * * *"

The word, *"consent"* as used by the court means that the stockholders may act before the corporation, acting through its officers, sells all its property. They need not await the sale and then merely confirm.

In *Hearst v. Putnam Mining Co.,* supra, the Utah court says at page 197 of the Utah report that a corporation

> "* * * may, in the absence of restraint by the law of its creation, lease, sell, or dispose of any or all of its property, the same as an individual may do

> respecting his property. This may be done by a majority of the members. The principle that the majority must rule in the management of the affairs of a corporation 'is rigidly upheld in equity, in the absence of fraud, oppression, and ultra vires acts.' "

It is true that the broad of directors, in the exercise of the corporate powers, may sell the corporate property; but if they do, the sale, in order to be binding and valid, must be confirmed by a vote of the majority of the stockholders. *Revised Statutes of Utah, 1933, 18-2-16 (7)* provides:

> "* * * When the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors in selling or otherwise disposing of such property shall not be valid or binding on the corporation until confirmed by a vote of a majority of the stock entitled to vote at a meeting of the stockholders duly called to consider such action of the board. * * *"

This statute is not in conflict with the cases cited. It in no wise restricts the right of stockholders to authorize the sale of all the corporate property. On the contrary, it recognizes that the ultimate right of disposition resides in them and not in the board of directors. The statute is a limitation on the power of directors, not on the power of the stockholders.

POINT 2.

The minutes of the meeting held July 12, 1941 reveal on their face that the stockholders met with the board of directors. There is no irregularity whatever to be found or suggested in the official minutes of the company. The alleged irregularities in the service of notice and in the authority of the President and in the transactions had between petitioner and respondents were all discovered long after the time petitioner says they occurred and were brought to light by defense counsel in an attempt to give legal sanction to the repudiation by the petitioner of the acts of its President. Respondents were not required to ascertain at their peril whether or not a directors' meeting was properly called and legally convened and a quorum of the board was actually present at the meeting. Assuming, but not admitting, that

the President's authority to sell had to originate with the board of directors as contended by petitioner, respondents, had they scrutinized the minutes of the meeting of July 12, 1941 would have seen that the directors met with the stockholders, and that Scorup had been authorized to sell the properties of the company. The corporation cannot escape the consequences of its commitments by the simple expedient of repudiating its own minutes, even though there may have been a defect in the authority of those acting for it.

In *Huntington Roller Mills &Mfg. Co. v. Miller*, supra, where the corporation mortgaged all of its property, the Utah Supreme Court said:

> "One of the principal errors assigned and argued is that the court erred in its finding that said note and mortgage were duly executed and delivered at the meeting held by the board of directors of appellant, consisting of the three members named in the findings. Counsel for appellant, with much vigor, contend that the preponderance of the evidence is to the effect that the directors' meeting at which the note and mortgage were authorized was a special or called meeting; that no notice was given to the two directors who were not present at said meeting, and for that reason the meeting held by the three directors was not authorized by law, and hence their act in authorizing the execution and delivery of the note and mortgage in question was invalid and of no force or effect. (Cases cited.) The foregoing authorities hold that, generally speaking, special or called meetings of a board of directors cannot legally be convened and held without notice to the directors, and that the acts of a quorum of the directors when acting without notice of the meeting with certain exceptions are invalid and cannot be enforced. The question, therefore, is: Are all persons dealing with corporations required to ascertain at their peril whether a directors' meeting was properly called and legally convened, and whether a quorum was actually present at said meeting?
>
> "That question has frequently come before the courts. In 3 Cook, Corps., in the section before referred

to, the author, in speaking of the question now under consideration says:

"'Difficulty has arisen in determining whether a person taking a mortgage from or executing a contract with a corporation is bound to ascertain whether a quorum of the directors was present at the directors' meeting which authorized the instrument, and whether a majority voted in favor thereof. There are many cases where the mortgages and contracts have been held void by reason of defects in the calling, holding, or voting at the directors' meeting.

"'The rule sustained by the great weight of authority, however, is that, where a corporate mortgage or contract is signed and sealed by the corporation and delivered to the proper person, who takes it in good faith, he may act upon it, and is protected even though the directors' meeting was not regularly called or held. A quorum of the directors is presumed to have been present. A quorum is not present in passing upon a matter in which one of the directors is personally interested, where only a bare quorum is present when he is counted.'

"Moreover, in the case at bar it appears from the bill of exceptions that the minutes of the directors' meeting at which the note and mortgage in question were authorized affirmatively show that the meeting was duly held, and that a quorum was present and voted in the affirmative. If the respondent, therefore, had examined the records kept by the corporation, all that she would have discovered would have been that the note and mortgage were duly authorized by the corporation through its directors."

Merchants' National Bank of Boston v. The State National Bank of Boston, 77 U. S. 676, 19 L. Ed. 1008. At page 1018 the court says:

"Where a party deals with a corporation in good faith —the transaction is not ultra vires—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corpo-

ration, and there is nothing to excite suspicion of such defect or irregularity; the corporation is bound by the contract, although such defect or irregularity in fact exists.

"If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

"The jury should have been instructed to apply this rule to the evidence before them.

"The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this court."

On the record, a jury could find the President of petitioner was authorized to execute the "Optional Contract", which, it will be noted, was never requdiated by petitioner. *Carlquist v. Quayle,* 62 Utah 266, 218 Pac. 729.

POINTS 3 AND 4.

It is suggested that petitioner should not request the Supreme Court of the United States to review an opinion of the Circuit Court of Appeals because of alleged uncertainty. The certainty or uncertainty of an offer and the acceptance thereof depend in large measure on oral testimony and inferences to be drawn therefrom. The United States Supreme Court ordinarily will not grant certiorari to review such matters. *General Talking Pictures Corp. v. Western Electric Co.*, supra. Inasmuch as petitioner devotes considerable space to this aspect of the case, respondents present their views in this connection. Respondents submit there is no uncertainty in the offer and its acceptance. The minutes of the meeting of July 12, 1941 show the President had already offered to sell the outfit for $532,500.00. A motion then follows authorizing the President to sell the holdings of the company for $532,500.00 on "range delivery or tally the cattle over at $40 per head for all born prior to 1941 and a fair price for the 1941 calves; $50 per head for 150 horses, $50 per acre for farm land, $3 per acre for winter grazing land, $5 per acre for summer grazing land * * *." (R. 58)

In the "Optional Contract" petitioner's President, responsive to the authorization, offered to sell its property to respondents for $532,500.00. In the same document and pursuant to the authorization the holdings were offered on the basis of tally branding and delivery at a price per unit.

The "Optional Contract" contains two methods of purchase and "the method of purchase was to be selected by the buyer on or before the first of September." The instrument then provides that when the buyer accepts he is to make the first payment of $74,000.00 on or before the first of September, which, when added to the $1000 paid for the option August 2, 1941, would make the total sum of $75,000.00. The offer could be accepted at any time before September 1, but the payment of $74,000 did not have to be made before that date. Further payment, that is, the balance of the purchase price is to be made on the basis of *delivery* of cattle *or* the *formal turning over* of the *assets* of the seller. If the buyer accepted the offer to sell on the tally or unit basis the further payment was to be on the basis of delivery; whereas, if the buyer accepted the offer to sell all the property for $532,500.00 the further payment was to be on the basis of the formal turning over of the assets of the seller. (R. 84-85) This was a continuing offer, *Chournos v. Evona Investment Company,* supra, which was never withdrawn by the offeror. After respondents filed suit against petitioner for breach of contract, it was claimed for the first time by petitioner that the offer to sell was rejected by what it designates a counter-offer on the part of respondents, but which the Circuit Court of Appeals held was an unconditional acceptance of the offer. The acceptance referred to was delivered to petitioner on August 27, 1941 and provided:

"August 27, 1941.

"Scorup-Somerville Cattle Company, Moab, Utah.

"Attention: Mr. J. A. Scorup, President.

"Gentlemen: On August 2, 1941, the Scorup-Somerville Cattle Company granted to Merrion and Wilkins, a co-partnership doing business in Denver, Colorado, a certain Option, hereinafter called Option No. 1, dated August 2, 1941 (which option was executed on behalf of said company by its president, J. A. Scorup), to purchase approximately 9,000 cattle and all the real and personal

property and other assets of said company for a total purchase price of $532,500.00.

"An alternate option, dated the same date, was also granted by the Scorup-Somerville Cattle Company to Merrion and Wilkins to purchase all of the assets of said company consisting of certain real and personal property and approximately 9000 cattle, 5000 thereof to be delivered to the railroad and the balance to be tally branded, at a total purchase price to be computed on the basis of the number of cattle actually delivered and the number of acres or real property conveyed.

"Said option, according to their terms, each expire September 1, 1941.

"We, the undersigned, on this 27th day of August, 1941, hereby notify the Scorup-Somerville Cattle Company and its President, J. A. Scorup, that we hereby exercise Option No. 1 hereinbefore described, and we hereby tender to the Scorup-Somerville Cattle Company payment of the purchase price, as provided in said option, upon satisfactory and proper conveyance by the Scorup-Somerville Cattle Company to the undersigned of all of the assets owned by said company on the date of said option and thereafter, including 1000 acres, more or less, of irrigated land, 17,000 acres, more or less, of pasture land, 10,000 acres, more or less, of range land, approximately 9000 cattle, approximately 3000 calves, etc.

"Very truly yours,

"Merrion and Wilkins

By Russel Wilkins (sgd.)" (R. 90-91)

The offer known as "Option No. 1" was accepted; payment of the purchase price was tendered as provided in the "Optional Contract." That is, payment was to be made in accordance with the terms of the offer upon satisfactory and proper conveyance by the seller of the assets purchased. That the buyer, after an unequivocal acceptance of the seller's offer, indicated the nature and amount of property to be turned over, and that the conveyance of the property should be proper, indicates only that which in law and under the offer the seller

was bound to do and does not vitiate or tend to vitiate the acceptance, *Turner v. McCormick, Kreutzer v. Lynch, Horgan v. Russell, McCormick v. Stephany, Cates v. McNeil, Restatement of The Law of Contracts,* supra.

At all times the parties knew the meaning of the offer and its acceptance. They were never uncertain to them. The parties conducted their business with the assurance that an offer had been made and accepted. But if there be any uncertainty, it is the type of uncertainty which under the law can be made certain by evidence at a trial of the issues. The universal rule that, that is certain which can be made certain, was early adopted and has been constantly adhered to by the courts of Utah. *Easton v. Thatcher,* supra; *Cummings v. Nielson,* supra.

Upon the record it appears that respondents made tender to petitioner of the $74,000.00 in cash a few minutes before six o'clock P. M. on September 2, 1941, and at the same time reiterated their acceptance. This was within the time fixed by the agreement for such payment, since September 1, 1941 was a legal holiday in Utah. *R. S. U. 1933, 37-0-1; 88-2-8; Leiner v. State Mutual Life Assurance Co.,* 108 F. (2d) 302. Petitioner refused to accept the money and rejected the tender, not because of any of the reasons now urged to defeat its agreement, but, as stated by Mr. Scorup, petitioner's President, because "the time was up." (R. 96-97) The trier of facts would be justified in finding that this statement of Mr. Scorup and petitioner's attorneys was the only basis for the repudiation of their contract. This excuse, however, was not repeated in the District Court and nothing was claimed for it in the Circuit Court of Appeals. When the tender was made it was then too late for petitioner, under any view of the case, to withdraw its offer or repudiate its contract.

On the record before it and after hearing the same arguments of petitioner it is now advancing to this court, the Tenth Circuit Court of Appeals held that petitioner made a continuing offer which respondents accepted unconditionally, thus giving rise to a contract between the parties, which petitioner had no right to repudiate.

CONCLUSION

It is the conclusion of respondents that:

1. The Tenth Circuit Court of Appeals properly held the trial court erred in entering summary judgment for peti-

tioner and against respondents, because the Scorup-Somerville Cattle Company, petitioner herein, by and through its President, duly and legally authorized thereto, entered into what was termed an "Optional Contract" with respondents whereby petitioner offered to sell all its assets to respondents for $532,500.00, which offer respondents accepted, thus giving rise to a contract, performance of which was tendered by respondents to petitioner and by petitioner rejected.

2. The Supreme Court of the United States should deny the petition for certiorari in this case.

Respectfully submitted,

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